Public Prosecutor v Daud bin Ahmad

HIGH COURT (MUAR) — CRIMINAL TRIAL NO 45–5 OF 2006
AHMADI ASNAWI JC
28 NOVEMBER 2009

Criminal Law — Murder — Defence — Grave and sudden provocation — Test to be applied — Whether proved on balance of probabilities — Accused reaction and retaliation way out of proportion with alleged provocation by deceased — Whether reasonable man in similar circumstances would have been so provoked — Penal Code s 300 Exception 1

Criminal Law — Murder — Defence — Sudden fight — Whether proved — Whether there was fight between deceased and accused — Whether deceased had chance to fight back — Penal Code s 300 Exception 4

Criminal Law — Penal Code — s 302 — Murder — Elements to be proven by prosecution — Whether case proven beyond reasonable doubt — Whether totality of cumulative effect of evidence led irresistible conclusion that accused caused death — Whether accused intended to cause death of deceased — Whether natural consequence of act of accused was to cause death

Criminal Procedure — Trial — Confession — Confession made by murder accused to his employer — Whether admissible — Whether statement had direct reference to offence committed — Whether statement made by accused under inducement, threat or promise — Voluntariness of statement — Whether caught under exclusionary provision of s 24 of the Evidence Act 1950

Evidence — Confession — Admissibility of confession — Confession made by murder accused to his employer — Whether statement had direct reference to offence committed — Whether statement made by accused under inducement, threat or promise — Voluntariness of statement — Whether caught under exclusionary provision of s 24 of the Evidence Act 1950

The accused was charged under s 302 of the Penal Code ('Code') for the offence of murdering his ex-wife. At the time of her death, the deceased and all the five children of the marriage lived at an unnumbered house at

Kampung Lubok Batu, Segamat. PW7, their eldest child testified that at about 1am on 26 August 2005 she heard the accused and deceased quarrelling loudly outside the door of their house. They were quarrelling over the custody of their youngest son who was then about six years old. The quarrel lasted for about ten minutes. PW7 heard the deceased finally saying that she was going to put up the night at her uncle's house across the road. Soon after PW7 heard foot steps leaving the house and the quarrel ended. The next day the deceased body was found at a rubbish dump about 50–60 feet away from their house. The accused was arrested and charged. PW3 (the accused's employer) testified that on 27 August 2005 he spoke to the accused on the telephone where the accused confessed to him. The gist of the accused defence was that he had held the neck of the deceased with one hand until the deceased fainted which he testified that it was for the purpose of keeping her mouth shut and to prevent her from further abusing him. DW2 (the accused's brother) testified that the accused was sick and also appeared to be mentally disturbed.

Held, convicting and sentencing the accused to death:

(1) On a charge under s 302 of the Code it is incumbent upon the prosecution to prove (a) that the deceased had died; (b) that the deceased died due to the injuries sustained by her; (c) that the death of the deceased was occasioned by the act or conduct of the accused; and (d) that the act by which the accused caused such death was done (i) with the intention of causing death; or (ii) with the intention of causing bodily injury as the accused knew to be likely to cause the death of the person whom the harm was caused; or (iii) with the intention of causing bodily injury to the person, and the injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death; or (iv) with the knowledge that the act was so imminently dangerous that it must in all probability cause death and commits such act without any excuse for incurring the risk of causing death or such injury (see para 8).

(2) There was no dispute as regards to the death of the deceased. She was identified by her own daughter, PW7, her son PW11 and her neighbour PW10. PW8 the pathologist testified that the cause of death was due to ligature strangulation applied upon her neck (see paras 9 & 11).

(3) The statement the accused gave to PW3 amounted to a confession. It had a direct reference to what he did to the deceased which formed the basis of the charge against him. There was no inducement, threat or promise given by PW3 to prompt the accused to confessed to him not withstanding that PW3 was then his employer. The evidence indicated that the confession was given voluntarily to PW3. Hence the confession

of the accused to PW3 was admissible in evidence. It is not caught under the exclusionary provision envisaged by s 24 of the Evidence Act 1950 (see para 37).

(4) The series of circumstances and coincidences enumerated by the witnesses when considered in the aggregate pointed to the irresistible conclusion that it was the accused that occasioned the death of the deceased and no one else. The evidence showed that the accused was with the deceased that night having a heated quarrel; thereafter the accused had sexual intercourse with the deceased; the deceased was found dead the next morning; the deceased died due of ligature strangulation and finally the accused confessed that he caused the death of the deceased by strangulation, consistent with the evidence of PW8 that the deceased died due to ligature strangulation. The totality of the cumulative effect of the evidence given by these witnesses only led to the irresistible conclusion that the accused indeed caused the death of the deceased (see paras 45–46).

(5) Upon the facts and evidence adduced the provisions of s 300(a) of the Code was most relevant to gauge the intention of the accused. The accused went after the most vital part of the human body. He constricted the neck/throat of the deceased by using the deceased's own scarf that could kill the deceased by asphyxiation if held long enough. In fact it was held long enough to have caused the death of the deceased. For the accused to apply such force and long enough on the most vulnerable part of the human body, he must have known that such act will endanger life. The accused intended to cause the death of the deceased by doing what he did to the deceased. The natural consequence of the act of the accused was to cause the deceased's death (see paras 48 & 51).

(6) The accused's reaction and retaliation was way out of proportion with the alleged provocation by the deceased which was neither grave nor sudden nor provocative. The accused may have been angered or offended but a reasonable man in similar circumstances would not have been so provoked as to lose his self control and strangle the deceased in the manner he did. There was no provocation at all. A reasonable man sharing the same cultural, educational and religious background and upbringing with the accused would have exercised self restraint to contain the situation from going out of control. The accused had failed to discharge the burden that Exception 1 of s 300 of the Code operated in his favour (see paras 83–84).

(7) The defence of sudden fight in the heat of passion upon a sudden quarrel — Exception 4, s 300 also failed. There was a quarrel but there was no fight between the deceased and the accused in the heat of passion upon the said quarrel. The deceased did not even have the

chance to fight back as the accused had held his neck so strongly until she fainted and dropped to the ground (see para 85).

(8) The evidence of DW2 was wholly irrelevant. It does not add value to the defence as it was never the defence case that the accused was sick or was labouring under some kind of mental incapacity to account for his deeds (see para 88).

(9) The defence posited by the accused was insufficient to dislodge the prosecution's case. It has not created any reasonable doubt upon the prosecution's case. The prosecution, on the other hand, had proved its case against the accused beyond a reasonable doubt. There was no doubt whatsoever that the accused murdered the deceased (see para 89).

[Bahasa Malaysia summary

Tertuduh telah dituduh di bawah s 302 Kanun Keseksaan ('Kanun') kerana kesalahan membunuh bekas isterinya. Pada masa kematiannya, si mati dan kesemua lima anak hasil perkahwinan mereka tinggal di sebuah rumah yang tidak bernombor di Kampung Lubok Batu, Segamat. PW7, anak sulung mereka telah memberi keterangan bahawa lebih kurang pukul 1 pagi pada 26 Ogos 2005 dia mendengar tertuduh dan si mati bertengkar dengan kuat di luar pintu rumah mereka. Mereka sedang bertengkar tentang hak penjagaan anak lelaki bongsu mereka yang pada masa itu berumur lebih kurang enam tahun. Pertengkaran itu berlanjutan selama lebih kurang 10 minit. PW7 telah mendengar si mati akhirnya berkata yang dia akan bermalam di rumah bapa saudaranya di seberang jalan. Sejurus kemudian PW7 mendengar bunyi tapak kaki meninggalkan rumah itu dan pertengkaran itu berakhir. Keesokan hari mayat si mati ditemui di longgokan sampah lebih kurang 50 hingga 60 kaki dari rumah mereka. Tertuduh telah ditangkap dan dituduh. PW3 (majikan tertuduh) telah memberi keterangan bahawa pada 27 Ogos 2005 dia telah bercakap dengan tertuduh melalui telefon di mana tertuduh telah membuat pengakuan kepadanya. Inti pati pembelaan tertuduh adalah bahawa dia telah memegang leher si mati dengan sebelah tangan sehingga si mati pengsan yang mana dia telah memberi keterangan adalah bertujuan untuk menutup mulutnya dan menghalangnya daripada terus memakinya. DW2 (abang tertuduh) telah memberi keterangan bahawa tertuduh sakit dan juga kelihatan mengalami gangguan mental.

Diputuskan, mensabitkan tertuduh dan menjatuhkan hukuman mati:

(1) Atas pertuduhan di bawah s 302 Kanun, pihak pendakwaan wajib membuktikan: (i) bahawa si mati telah meninggal dunia; (ii) bahawa si mati telah meninggal dunia akibat kecederaan yang dialaminya; (iii) bahawa kematian si mati telah disebabkan oleh tindakan dan perlakuan

A tertuduh; dan (iv) bahawa tindakan tertuduh yang telah menyebabkan kematian tersebut telah dilakukan: (a) dengan niat untuk menyebabkan kematian; atau (b) dengan niat untuk menyebabkan kecederaan pada badan kerana tertuduh mengetahui kemungkinan akan menyebabkan kematian seseorang disebabkan kecederaan itu; atau (c) dengan niat B menyebabkan kecederaan pada badan seseorang, dan kecederaan yang diniatkan untuk dikenakan adalah mencukupi dalam sifat sebab biasa untuk menyebabkan kematian; atau (d) dengan pengetahuan bahawa tindakan itu amat berbahaya sehingga dengan segala kemungkinan akan menyebabkan kematian dan melakukan tindakan tersebut tanpa C apa-apa alasan untuk menyebabkan risiko menyebabkan kematian atau kecederaan sedemikian (lihat perenggan 8).

(2) Tiada pertikaian berkaitan kematian si mati. Dia telah dikenalpasti oleh anak perempuannya sendiri, PW7, anak lelakinya PW11 dan jirannya PW10. PW8 ahli patologi telah memberi keterangan bahawa sebab D kematian adalah akibat cekikan ligatur yang berlaku pada lehernya (lihat perenggan 9 & 11).

(3) Kenyataan tertuduh yang telah diberikan kepada PW3 merupakan pengakuan. Ia adalah rujukan secara langsung kepada apa yang telah E dilakukannya kepada si mati yang membentuk asas pertuduhan terhadapnya. Tiada pujukan, ugutan atau janji diberikan oleh PW3 untuk menyebabkan tertuduh mengaku kepadanya meskipun PW3 pada masa itu adalah majikannya. Bukti menunjukkan bahawa pengakuan itu telah diberikan secara sukarela kepada PW3. Justeru itu F pengakuan tertuduh kepada PW3 boleh diterima sebagai keterangan. Ia tidak terangkum di bawah peruntukan pengecualian yang termaktub dalam s 24 Akta Keterangan 1950 (lihat perenggan 37).

(4) Turutan keadaan dan kebetulan yang disebutkan oleh saksi-saksi apabila diambilkira secara keseluruhan menunjukkan kesimpulan yang nyata G bahawa tertuduhlah yang menyebabkan kematian si mati dan tiada sesiapa lagi. Keterangan menunjukkan bahawa tertuduh bersama si mati pada malam itu dan sedang bertengkar (keterangan PW7); berikutan itu tertuduh telah melakukan perhubungan jenis dengan si H mati (keterangan PW9 dan PW16); si mati telah ditemui mati keesokan hari (keterangan PW10, PW6, PW7 dan PW8); si mati telah meninggal dunia akibat cekikan ligatur (keterangan PW8) dan akhirnya tertuduh membuat pengakuan bahawa dia telah menyebabkan kematian si mati dengan mencekiknya (keterangan PW3), yang konsisten dengan I keterangan PW8 bahawa si mati telah meninggal dunia akibat cekikan ligatur. Kesan kumulatif keseluruhan keterangan yang diberikan oleh saksi-saksi berikut hanya membawa kepada kesimpulan yang nyata bahawa tertuduh sememangnya telah menyebabkan kematian si mati (lihat perenggan 45–46).

(5) Berdasarkan fakta dan keterangan yang dikemukakan peruntukan s 300(a) Kanun amat relevan untuk mengukur niat tertuduh. Tertuduh telah mencederakan bahagian paling penting pada badan manusia. Dia telah menjerut leher/kerongkong si mati dengan menggunakan tudung si mati sendiri yang boleh membunuh si mati pengasfiksian jika dijerut terlalu lama. Bahkan ia dijerut cukup lama untuk menyebabkan kematian si mati. Untuk tertuduh menggunakan kekerasan dan cukup lama pada bahagian badan manusia yang paling mudah diserang, dia semestinya mengetahui bahawa tindakan sedemikian akan membahayakan nyawa. Tertuduh berniat untuk menyebabkan kematian si mati dengan melakukan apa yang dia telah lakukan ke atas si mati. Akibat semulajadi daripada tindakan tertuduh telah menyebabkan kematian si mati (lihat perenggan 48 & 51).

(6) Reaksi dan tindak balas tertuduh tidak seimbang dengan provokasi yang dikatakan oleh si mati yang mana kedua-duanya tidak bersifat provokatif yang berbahaya atau tiba-tiba. Tertuduh mungkin menjadi marah atau tersinggung tetapi seorang yang waras dalam keadaan sama tidak akan bersikap begitu provokatif sehingga hilang kawalan diri dan mencekik si mati sepertimana yang telah dilakukan olehnya. Tiada provokasi langsung di sini. Seorang yang waras yang mempunyai latar belakang budaya, pelajaran dan agama serta didikan yang sama dengan tertuduh pasti akan mengawal dirinya untuk menghalang situasi daripada menjadi tidak terkawal. Tertuduh telah gagal untuk melepaskan beban agar Pengecualian 1 kepada s 300 Kanun berfungsi berpihak menyebelahinya (lihat perenggan 83–84).

(7) Pembelaan pergaduhan tiba-tiba dalam keadaan naik berang akibat daripada perkelahian tiba-tiba — Pengecualian 4, s 300 juga gagal. Suatu perkelahian telah berlaku tetapi tiada pergaduhan antara si mati dan tertuduh akibat daripada perkelahian tersebut. Si mati tidak berpeluang langsung untuk melawan balik kerana tertuduh telah memegang lehernya dengan begitu kuat sehingga dia pengsan dan jatuh ke bumi (lihat perenggan 85).

(8) Keterangan DW2 tidak relevan langsung. Ia tidak memberi apa-apa kelebihan kepada pembelaan kerana ia bukan kes pembelaan bahawa tertuduh sakit atau mempunyai ketidakupayaan mental untuk mengingati perbuatannya (lihat perenggan 88).

(9) Pembelaan yang dianjurkan oleh tertuduh tidak mencukupi untuk membuang kes pendakwaan. Ia tidak menimbulkan apa-apa keraguan munasabah terhadap kes pendakwaan. Pendakwaan, sebaliknya, telah membuktikan kesnya terhadap tertuduh melampaui keraguan munasabah. Tiada keraguan apa-apa sekalipun yang tertuduh telah membunuh si mati (lihat perenggan 89).]

Notes

For a case on defence in murder, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.

For cases on admissibility of confession, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 775–777.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

For cases on trial in general, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4549–5094.

Cases referred to

Abu Bakar bin Nazmeer v PP [1970] 2 MLJ 216; [1970] 1 LNS 2, HC (refd)
Bala anak Matik v PP [2006] 3 MLJ 516; [2006] 1 LNS 8, CA (refd)
Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (folld)
Deokinanan v R [1968] 2 All ER 346, PC (not folld)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 289; [2004] 4 CLJ 551, CA (folld)
Idris v PP [1960] MLJ 296, CA (refd)
Ikau Anak Mail v PP [1973] 2 MLJ 153; [1973] 1 LNS 51, FC (refd)
Lee Kim Ching, Re [1974] 2 MLJ 44; [1974] 1 LNS 137, HC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 374, CA (folld)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ (Rep) 162, SC (refd)
Mohd Abbas bin Danus Baksan v PP [2006] 5 MLJ 332; [2006] 3 CLJ 880, CA (refd)
Nanavati v State of Maharastra AIR 1962 SC 602 (refd)
PP v Abdul Razak bin Dalek [2007] 2 MLJ 255; [2006] 4 CLJ 129, HC (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)
PP v Naikan [1961] MLJ 147; [1960] 1 LNS 87, HC (distd)
Rex v Tara Singh [1933] 2 MLJ 40; [1933] 1 LNS 89, HC (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138 (folld)

Legislation referred to

Evidence Act 1950 ss 24, 105
Penal Code ss 300(a), (b), (c), (d), Exceptions 1, 4, 302

Abdullah bin Mutalib (Abdullah & Co) for the appellant.
Mohd Ashrof Adrin bin Kamarul (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JC:

[1] The charge against the accused, Daud bin Ahmad is as follows:

> Bahawa kamu pada 26.8.2005, diantara jam lebih kurang 1.30 pagi hingga 2.30 pagi di hadapan rumah tidak bernombor, Kampung Lubok Batu, dalam daerah Segamat, dalam Negeri Johor Darul Takzim, telah melakukan bunuh dengan menyebabkan kematian Mimi Afiza binti Tamby (KP No: 740804-01-6344) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

FACTS IN BRIEF

[2] The deceased was the accused's ex-wife. They were divorced on 25 June 2005. At the time of her death, the deceased and all the five children of the marriage lived at the abovesaid unnumbered house at Kampung Lubok Batu, Segamat. The accused lived elsewhere. The deceased worked at a *kedai makan* in Segamat town. Her working hours was from 5pm to 12 midnight.

[3] PW7 was their eldest child. At about 1am on 26 August 2005 she was woken up by her brother. She heard people quarrelling loudly outside the door of their house. There were only two voices, one belonging to a female and the other to a male. She identified the female voice as that of her mother's and the male voice as that of her father, the accused. They were quarrelling over the custody of their youngest son who was then about six years old. The accused demanded custody of the said child but her mother steadfastly refused to accede to his demands.

[4] In the midst of the quarrel, her mother asked her to open the door of the house. She refused to do so out of fear of her father whom she described as an unevenly hot tampered fellow. The quarrel lasted for about ten minutes. She heard her mother finally saying that she is going to put up the night at her uncle's house across the road. Soon after she heard foot steps leaving the house. The quarrel ended. Both her mother and father were gone.

[5] At about 2.30am the same night, PW7 was again woken up. This time by knocks on the door of the house. She heard her father repeatedly asking her to open the door. Again out of fear, she ignored her father's requests and went back to sleep.

[6] The next day (27 August 2005) at about 10.30am she was told by her brother that some village boys had found the body of a dead woman at a rubbish dump about 50–60 feet away from their house. She took a look from

A the front part of the house but could not make out who the dead person was. However at about 2pm, PW6, the investigation officer (IO) of the case, took her to the dead body. She identified the dead person to be her mother, Mimi Afiza bt Tamby.

B **[7]** The accused was arrested on 27 August 2005 at about 7.30pm by PW4 at the compound of Masjid Jamek Parit Zin, Bakri, Batu 6, Muar. Apparently the accused surrendered to the police through the arrangement made by PW3, his then employer.

C INGREDIENTS OF THE OFFENCE

[8] On a charge under s 302 of the Penal Code it is incumbent upon the prosecution to prove:

D (a) that the deceased Mimi Afiza bt Tamby had died;

(b) that the deceased died due to the injuries sustained by her;

(c) that the death of the deceased was occasioned by the act or conduct of the accused;

E (d) that the act by which the accused caused such death was done —

(i) with the intention of causing death; or

(ii) with the intention of causing bodily injury as the accused knew to be likely to cause the death of the person whom the harm was cause; or

F

(iii) with the intention of causing bodily injury to the person, and the injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death; or

G

(iv) with the knowledge that the act was so imminently dangerous that it must in all probability cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

H

The death of the deceased, Mimi Afiza bt Tamby

[9] It is my findings that there is no dispute as regards to the death of the deceased. She was identified by her own daughter, PW7 and her son PW11.

I The deceased was also identified by her neighbour PW10, the first person informed by the village boys of the discovery of the deceased's body. PW10 was also the person who informed the police about the said discovery. Additionally the deceased was also identified by the IO together with the sister of the deceased, one Maimunah bt Tamby, during the post mortem on

the deceased, conducted by the pathologist, PW8.

Whether the death of the deceased was occasioned by the injuries suffered by her

[10] PW8 is the pathologist. He conducted the postmortem on the deceased. He found the following features:

(a) her face was markedly congested (with blood) along with upper chest and neck.

(b) her fingertips were cyanosed (bluish discoloration, indicating inadequate oxygenation of the blood);

(c) subconjuctival haemorrhages of the eyelids (sockets); the scalp when reflected showed congestion with petechiae showers and a bruised area 3cm in diameter on outer upper right frontal area;

(d) the soft tissues of the mouth, throat and neck structure were congested with blood; and

(e) the trachea and its air passages contained substantial blood froths and both lungs were markedly congested and oedematous (excess of watery fluid).

[11] PW8 testified that his examination indicated asphyxial changes on the face and finger tips, with minimal trauma marks on the neck externally and internally. Together with the presence of a scarf which was wound twice around the neck of the deceased, he opined that these findings were consistent with ligature strangulation, using broad and soft material, the like of the scarf in question. He formulated that the cause of death was due to ligature strangulation.

[12] At p 58 of the notes of evidence, PW8 elaborated further:

> Cekikan pada leher akan menyebabkan pernafasan terganggu/terhenti dan akan mendatangkan tanda-tanda tersebut. Lehernya diganggu pada waktu yang pendek menyebabkan mangsa tidak dapat bernafas dan mati.
>
> Jangka cekikan? Dalam tempoh 1 hingga 30 saat. Seseorang boleh mati dalam tempoh 30 saat kalau dicekik dengan betul. Mati disebabkan tidak dapat bernafas.

[13] PW8 added under cross-examination that even without the scarf around the deceased's neck he would still conclude that the cause of death was due to asphyxia as the symptoms/features found by him on the deceased's body indicated that her death was due to asphyxia. Ligature strangulation is

a form of asphyxia. The same features would appear in any form of asphyxia. Put simply asphyxia is the genus whereas ligature strangulation is a specie of the said genus.

[14] By and large, SP8's findings as to the cause of death of the deceased were not really challenged. I have no reason to disagree with him. It is thus my findings that the deceased died because of the ligature strangulation applied upon her neck.

Whether the death of the deceased was occasioned by the act of the accused

[15] Admittedly there is no direct evidence to implicate the accused with the death of the deceased. Hence reliance was made on circumstantial evidence to prove this element of the offence as can be gathered from the evidence of PW6, PW7, PW8, PW16, PW3 and PW15.

THE EVIDENCE OF PW7

[16] PW7's evidence has been enumerated earlier. She was the last person to have heard her mother alive having a quarrel with her father, the accused outside the door of their house at about 1am on 26 August 2005. Her voice identification of her mother and her father was not challenged. Equally I have no reason to doubt her voice identification as she was the closest next of kin of the couple. Therefore I accepted her testimony that the accused was together with the deceased having a heated quarrel that night, a couple of hours before her dead body was discovered the next morning. The accused was thus the last person known to have been with the deceased before the demise of the deceased.

THE EVIDENCE OF PW8 AND PW6

[17] Apart from telling us how the deceased succumbed to her death, PW8 also testified that he took two (2) vaginal swabs, one from inside the vagina and the other from the lips of the vagina for traces of spermatozoa. He handed the exhibits to the IO of the case, PW6 after having the same securely sealed in two plastic bottles. He identified the swab sticks as exhs P24(B) and P25(B).

[18] PW6 in turn sealed the said teo plastic bottles in two envelopes he marked 'Q' and 'R' respectively.

[19] On 6 September 2005, PW6 took the accused to Hospital Segamat to procure his blood specimen with his consent. The accused's blood specimen in plastic tube labeled 'Daud Ahmad' is exh P10(A). PW6 also sealed this plastic tube in an envelope he marked 'N'.

[20] On 2 January 2006, PW6 had these three envelopes Q, R, N and 15 other exhibits (in sealed envelopes marked A, B, C, D, E, F, G, H, I, J, K, L, M, O, P) to the chemist PW9.

THE EVIDENCE OF PW9

[21] PW9 is the chemist, attached with Jabatan Kimia, Johor Bahru. He examined and analysed the swab sticks in envelope Q and R (exhs P24(B) and P25(B)) and found the same to have the possibilities of carrying traces of spermatozoa.

[22] PW9 also examined the plastic tube containing the accused's blood specimen in envelope N (exh P10(A)) and found the specimen to be a 'B' group human blood specimen. He then smudged/smeared the said blood specimen on to an FTA card and sealed it in envelope he marked JK1 (exh P26(A)). The FTA card is exh P26(B).

[23] PW9 then directed the IO to send exhs P24(B), P25(B) (both in envelopes marked Q and R), P26 (B) (in envelope marked JK1), and nine other exhibits (envelopes marked A, B, C, D, J, K, L, M and JK2) for DNA analysis at Jabatan Kimia Malaysia, Petaling Jaya.

THE EVIDENCE OF PW16

[24] PW16 is the DNA expert. At the material time he was a chemist, attached with the Bahagian Forensik, Jabatan Kimia Malaysia Petaling Jaya. His credentials are most impressive.

[25] On 3 January 2006, PW14 took over the investigation of the case from PW6 upon the latter's transfer to IPK Melaka.

[26] On 17 March 2006, PW14 received 18 sealed envelopes bearing the markings A to R and two other envelopes marked JK1 and JK2 from PW6. These sealed envelopes had earlier in the day been taken back from PW9 by PW12 who in turn handed the same back to PW6.

[27] As instructed by PW9, on 29 March 2006, PW14 sent the said 12 sealed envelopes to PW16 at Jabatan Kimia Malaysia, Petaling Jaya. However

A he put the said 12 sealed envelopes into 12 other new envelopes which he marked A1 to A12 respectively. In the court the markings of the said sealed envelopes prepared by PW14 are P16, P17, P18, P19, P20, P21, P22, P23, P24, P25, P26 and P27. The swab sticks (exhs P24(A) and P24(B)) in envelopes Q and R were placed in sealed envelopes marked A9 (exh P24) and
B A10 (exh P 25). The FTA card (exh P25(B)) in the sealed envelope JK1 was placed in a sealed envelope marked A11 (exh P26).

[28] PW16 conducted an analysis to establish the DNA profiles of all the exhibits submitted to him. As regards to the swab sticks in envelopes Q and
C R and the blood specimen labeled 'Daud Ahmad' smeared on the FTA card (exh P26(B)) he found (in his own words for purposes of accuracy):

> Profil DNA yang diperolehi daripada spermatozoa pada putik kapas 'Q' dan 'R' adalah profit DNA seorang lelaki yang berpadanan (match) diantara satu sama lain
D dan berpadanan dengan profil DNA specimen darah 'JK1' (berlabel 'Daud Ahmad') menunjukkan bahawa DNA yang dikenalpasti berasal dari sumber yang sama. Probabiliti seorang yang dipilih secara rambang dan tidak mempunyai kaitan kekeluargaan mempunyai profil DNA yang sama dengan profil DNA tersebut di lima bekas lokus genetic adalah lebih kurang 1 dalam 14 quintillion (14 x 10) dikira berdasarkan pengkalan data STR penduduk Malaysia berbangsa Melayu.
E Spermatozoa dari putik kapas Q dan R adalah 99.9% dimiliki oleh lelaki Daud bin Ahmad. DNA profiling Q dan R dan darah dalam P-26 adalah berpadanan.

[29] Again there was no challenge as regards to this findings by PW16 by
F the defence. There wasn't any cross-examination at all in respect of the testimony of PW16. In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 at p 213; [1980] 1 LNS 138, at p 139 it was ruled that 'there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony'.

G

[30] In such event I have no hesitation in accepting the said findings by PW16. Thus, in my view the said findings established beyond any doubt that the accused had sexual intercourse with the deceased prior to her death, with or without her consent. This must have taken place after both of them had
H left the front door of the said house as heard and noted by PW7. The next morning the deceased body was discovered about 50–60 feet away from the said house.

[31] Again this factum of the accused's spermatozoa inside the vagina of the
I deceased indicated that the accused was the last person to have been in physical contact with the deceased within the vicinity of the said house and shortly after the time frame both of them were heard having a heated quarrel outside the said house and then leaving the said house as noted by PW7. Apparently the deceased did not make it to her uncle's house across the road

to spend the night there.

THE EVIDENCE OF PW3

[32] The accused was employed by PW3 as a general labourer about ten days prior to the death of the deceased. He knew about the death of the deceased on 26 August 2005 when he was informed by a villager that the OKT's wife, the deceased, had died that morning. He was getting ready for *Solat Jumaat* but nevertheless went to the deceased house and thereat saw a dead body under a tree. There were many people surrounding the body. The police were there too. He was told by the villagers that the dead body thereat was OKT's wife.

[33] The next day (27 August 2005) he (PW3) was at his father's house at Felda Medoi. At about 3.30pm he received a telephone call from the accused. The accused identified himself. He could also identify the voice of the caller as that belonging to the accused. As the phone line through his hand phone was not clear, he told the accused that he would call back. He used his father's fixed line telephone to call back the accused.

[34] PW3 managed to reconnect with the accused. The accused asked him about the situation in Segamat. He told the accused that his wife has died. PW3 then continued:

> Saya tanya dia 'kau buat ke?'
>
> OKT jawab 'ya'
>
> Lepas itu saya tanya 'awak buat macam mana'?
>
> OKT jawab 'aku cekik'.
>
> Saya cakap sekarang dia sudah meninggal dunia.

[35] Learned DPP submitted that the statement given by the accused to PW3 enumerated above is a confession. There was no threat, inducement or promise given by PW3 to prompt the accused to give the said statement. Additionally PW3 was not a person in authority. Therefore grounded upon the aforesaid premise the said statement/confession is a relevant fact under s 24 of the Evidence Act 1950 and consequently admissible in evidence.

DID THE ACCUSED MAKE THE STATEMENT

[36] There was no challenge at all by the defence in respect of whether the accused did in fact give or make the said statement to PW3. Hence upon the authority of *Wong Swee Chin v Public Prosecutor* I accepted PW3's evidence

A and find as a fact that the accused did give the said statement to PW3.

ADMISSIBILITY OF THE SAID STATEMENT IN EVIDENCE

B **[37]** There can be no doubt that the statement the accused gave to PW3 amounted to a confession. It has a direct reference to what he did to the deceased which formed the basis of the charge against him. On the evidence I am satisfied that there is no inducement, threat or promise given by PW3 to prompt the accuse to confess to him not withstanding that PW3 was then his employer. The evidence indicated that the confession was given C voluntarily to PW3. Hence I ruled that the confession of the accused to PW3 is admissible in evidence. It is not caught under the exclusionary provision envisaged by s 24 of the Evidence Act 1950 — see *Rex v Tara Singh* [1933] 2 MLJ 40; [1933] 1 LNS 89; *Re Lee Kim Ching* [1974] 2 MLJ 44; [1974] 1 LNS 137; and *Abu Bakar bin Nazmeer v Public Prosecutor* [1970] 2 MLJ 216; D [1970] 1 LNS 2.

[38] Learned counsel for the accused submitted that the facts of the case surrounding the making of the confession in this case before me were on all E fours with the facts in *Public Prosecutor v Naikan* [1961] MLJ 147; [1960] 1 LNS 87 and urged me to rule the said confession inadmissible. In *Public Prosecutor v Naikan* the confession was given to the manager of the estate, PW1. However the learned judge there found the following:

F (a) PW1's interview with the accused was in the form of questions and answers and it took about three-quarters of an hour;

(b) PW1 suggested by his manner that the accused should answer his questions truthfully;

G (c) he gave the accused the impression that he would help him to the best of his ability;

(d) PW1 admitted that it was possible that he could have exhorted the accused to speak the truth and that he could have used the words 'better tell the truth');

H (e) PW1 also said in his interviews with labourers on the estate it was his practice to urge them to speak the truth; and

(f) PW1 is a person in authority in relation to the accused.

I **[39]** At the end of the day, the learned judge stated that '... the words 'you had better tell the truth' and equivalent expressions have acquired a fixed meaning as if a technical term, and have always been held to import a threat or promise — see *Woodroffle and Ameer Ali on Evidence* (9th Ed) pp 283–284'.

[40] However none of the above ever took place in the case presently before me. PW3 merely asked 'kau buat ke?' It was a question put forth in the course of a casual conversation. It was a brief conversation, not in the form of a question and answer sessions that lasted almost 45 minutes as happened in *Public Prosecutor v Naikan*. PW3 also did not held out that he would help him to the best of his ability nor exhorted the accused to speak the truth or used the expressions 'you had better tell the truth' or its equivalent.

[41] The evidence revealed that PW3 did not threaten, induce or promise anything to the accused to prompt the accused to make the confession. He only asked 'engkau buat ke?' By no stretch of imagination would this question asked amount to a threat or promise or inducement.

[42] In a technical sense PW3 was a person in authority in relation to the accused. He was the accused's employer. However the ruling in *Deokinanan v R* [1968] 2 All ER 346 that '... it is essential to show that the inducement threat or promise was held out by a person in authority...' has no relevance here on account that the evidence here does not show that PW3 had threatened, induced or promised the accused to make the confession. As reiterated earlier, the said confession by the accused was made or given voluntarily to PW3.

THE EVIDENCE OF PW15

[43] PW15 is the *Pegawai Tadbir Agama*, Daerah Segamat Johor. He confirmed that the deceased and the accused were divorced on 24 June 2005. As of the date of her death there is no record to show that they have reconciled and *rujo*.

THE CUMULATIVE EFFECT OF THE EVIDENCE OF PW3, PW6, PW7, PW8, PW9, PW15 AND PW16

[44] The evidence of these witnesses went largely unchallenged. I have no reason to dispute or reject or treat their evidence with suspect. Thus I accepted their evidence as evidence of truth.

[45] In the final analysis it is my findings that the series of circumstances and coincidences enumerated by these witnesses when considered in the aggregate pointed to the irresistible conclusion that it was the accused that occasioned the death of the deceased and no one else — see *Idris v Public Prosecutor* [1960] MLJ 296; *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307; *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; and *Mohd Abbas bin Danus Baksan v Public Prosecutor* [2006] 5 MLJ 332; [2006] 3 CLJ 880.

[46] The evidence shows that the accused was with the deceased that night having a heated quarrel (evidence of PW7); thereafter the accused had sexual intercourse with the deceased (evidence of PW9 and PW16); the deceased was found dead the next morning (evidence of PW10, PW6, PW7 and PW8); the deceased died due of ligature strangulation (evidence of PW8) and finally the accused confessed that he caused the death of the deceased by strangulation ('cekik') (evidence of PW3), consistent with the evidence of PW8 that the deceased died due to ligature strangulation. The totality of the cumulative effect of the evidence given by these witnesses only led to the irresistible conclusion that the accused indeed caused the death of the deceased.

The intention of the accused

[47] It is next to impossible to gauge one's intention. Rather, intention is a matter for the court to infer from the act or conduct of the person from the proven set of facts or circumstances before, during or after the occurance of a particular event or incident. Hence in the absence of an express admission, the intention of the accused is a matter for the court to infer from what he did. However, on a charge under s 302 of the Penal Code, the imperative of the prosecution is to prove that the act of the accused leading to the demise of the deceased fall within the ambit of any one or a combination thereof, of the situations as envisaged by s 300(a), (b), (c) or (d) of the Penal Code.

[48] In my view, upon the facts and evidence adduced the provisions of s 300(a) is most relevent to gauge the intention of the accused. The provision provides:

> 300 Except in cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) ...
>
> (c) ...
>
> (d) ...

[49] In respect of the law relating to s 300(a) I seek assistance from His Lordship Jeffrey Tan J (as then was) in *Public Prosecutor v Abdul Razak bin Dalek* [2007] 2 MLJ 255 at p 275; [2006] 4 CLJ 129; at pp 156–157 who has dealt extensively on this subject. I need add no more to what His Lordship has meticulously considered. Thus at para 53:

(53) In relation to intention under the first clause of s 300, *Ratanlal & Dhirajlal*, ibid at pp 1296–1297, comented as follows:

> The first clause of s 300 enacts that culpable homicide is murder if the act by which death is caused is done with the intention of causing death ... An intention to kill a person brings the matter so clearly within the general principle of mens rea as to cause no difficulty. Such intention however, must be found as a matter of fact. It is distinct from presumed or constructive intention. The accused also cannot be held guilty from the knowledge of the consequences of the act.
>
> At the same time, however it is equally true that intention is a subjective element and in most of the cases direct proof of intention is not forthcoming. It has rightly been said that the devil himself knows not the thought of man. A man's intention is a question of fact and it can be gathered from his acts. In deciding the intention of the accused, the court may consider the nature of the weapon used, the part of the body of the victim chosen by the accused for attack, the number of blows administered, the force used by the assailant, etc.

(54) In *Virsa Singh*, the Supreme Court stated:

> To determine what the intention of the offender is, each case must be decided on its own merits. Where it is proved that the accused fired a gun shot at such close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that after firing at one person he reloaded the gun and fired a shot at another person there is clear indication of his intention to commit murder. Where a person fires two shots successively at another person his murderous intention is clearly evident. The law looks as regards intention to the natural result of the mans act and not to the condition of his mind. From a legal point of view a person intends whatever he gives other reasonable grounds for supposing that he does intend. Where a man strikes lathi blows on the head of the deceased mercilessly and practically kills him on the spot, he is guilty of murder. Where a man stabs another in a vital part he must be held to have intended to cause death, and if death ensures either directly from the wound or in consequence of the wound creating conditions which gave occasion to the appearance of a fatal disease, the person inflicting the wounds is guilty of murder. Absence of premeditation will not reduce the crime of murder to culpable homicide not amounting to murder ...

[50] So much for the position under s 300 cl (a).

[51] Coming back to the case presently before me it is apparent that the accused went after the most vital part of the human body. He constricted the neck/throat of the deceased by using the deceased's own scarf that can kill the deceased by asphyxiation if held long enough. In fact it was held long enough to have caused the death of the deceased. In this regard PW8 testified that '... jangka cekikan dalam tempoh 1 hingga 30 saat. Seseorang boleh mati dalam tempoh 30 saat kalau dicekik betul. Mati disebabkan tidak dapat bernafas'. It is apparent that the force applied to constrict the deceased throat/neck is considerable and long enough to have caused the death of the deceased.

[52] For the accused to apply such force and long enough on the most vulnerable part of the human body, he must have known that such act will endanger life. It is preposterous to suggest that the accused did not know that such act could cause asphyxiation on the victim. It is equally preposterous to suggest that the accused did not know the consequences of constricting the accused neck/throat in the manner he did. He must have known the consequences of doing what he did to the deceased. Now what kind of intention can be inferred from such act of the accused? On the facts and evidence it is my findings of fact that the accused intended to cause the death of the deceased by doing what he did to the accused. As stated by the Supreme Court of India in *Virsa Singh v State of Punjab* AIR 1958 SC 465, the law looks as regards intention to the natural result of the man's act and not to the condition of his mind. Viewed objectively the result of the intentional act of the accused upon the deceased indeed carried a high probability to cause death. There is no doubt that it is sufficient to cause death in the ordinary cause of nature. The natural consequence of the act of the accused is to cause the deceased's death.

WHETHER THERE IS ANY BREAK IN THE CHAIN OF EVIDENCE

[53] PW6 was not called to be identified by PW9 in the course of the testimony of PW9 as the person who handed the exhibits to him for his analysis. Learned DPP had earlier applied to court that the identification of PW6 by PW9 be dispensed with to save time and learned counsel did not object and expressed his agreement to the arrangement. Equally PW6 and PW14 were not called to be identified by PW2 in the course of the latter's testimony as the persons who handed several exhibits to him to be stored at *stor barang kes*, IPD Segamat. Learned counsel did not also object to the application made by the learned DPP for the dispensation of the identification of the two said witnesses by PW2.

[54] Now learned counsel submitted that the omission by the prosecution to call the said witnesses to be identified by PW9 and PW2 in court had occasioned a break in the chain of evidence.

[55] However I could not agree with learned counsel. Firstly learned counsel had agreed to the dispensation of the identification of the said witnesses by both PW9 and PW2. It simply means that he had accepted the evidence of PW9 that he (PW9) had received the said exhibits from PW6 and that he had also accepted the evidence of PW2 that he (PW2) had received the said exhibits from PW6 and PW14 to be stored at the said *Stor Barang Kes*.

[56] Secondly, the *resit akuan penerimaan* exh P37, prepared by PW9 specifically states that he (PW9) received the said exhibits as itemised therein from DSP Gan Chip Pho. PW6 who is DSP Gan Chip Pho, in turn stated that he received the said exh P37 from the chemist named Muhamad Yazid bin Ibrahim upon handing over the said exhibits to him. It is the uncontroverted testimony of PW6 that he had indeed sent and personally handed the said exhibits to the chemist Muhamad Yazid bin Ibrahim. He identified the exhibits sent to the chemist and the chemist, PW9, confirmed and identified the same exhibits handed to him by PW6. Now, there is only one DSP Gan Chip Pho involved in this case and he is none other than PW6. Hence the none identification of PW6 by PW9 in the course of his testimony did not negate the fact that PW6 had in fact handed over the said exhibits to PW9 who acknowledged receiving the said exhibits. In such event there can be no break in the chain evidence even if one's imagination were to be stretched to the fullest.

[57] Equally the same would apply to PW2 who testified that he received several exhibits from DSP Gan Chip Pho (PW6) and Chief Inspector Nik Azmi (PW14) to be stored for safe keeping at the *stor barang kes*, IPD Segamat. He registered the same in *buku pendaftaran barang-barang kes*, assigning it with entry number 28/06, a certified true copy of which is exh P28(S). He also registered the name of DSP Gan Chip Pho and Chief Inspector Nik Azmi in exh P28(S). PW2 identified in court the exhibits he received from both DSP Gan Chip Pho and Chief Inspector Nik Azmi. Likewise in court both DSP Gan Chip Pho (PW6) and Chief Inspector Nik Azmi (PW14) identified the exhibits they handed over to PW2. The exhibits identified by the three witnesses (PW2, PW6 and PW14) were the same exhibits (as that handed over by both PW6 and PW14 and received by PW2). Again in my view in such event there can be no break in the chain of evidence

[58] For the reasons given it is my view that there is no break in the chain of evidence in this case in terms as submitted by learned counsel. Equally, no

A doubt or discrepancies exist arising out of the non-identification of the said witnesses in court. I would allude to the principles enunciated in *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75 and in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 289; [2004] 4 CLJ 551, where in the latter case Abdul Hamid b Mohamed JCA (as he then was) said:

B

> The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap' does not necessarily mean that the fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing
> C that would give rise to a doubt that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

D **[59]** In my view the issue of break in chain will only succeed if doubts as to the identities of the exhibits can be shown arising out of the non-identification the said witness in court. None exists here though.

FINDINGS

E

[60] In the event, at the end of the prosecution's case it is my findings that upon a maximum evaluation of the evidence adduced thus far, the prosecution had made out a prime facie against the accused on the charge proffered against him (*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2
F MLJ 65; [2003] 1 CLJ 374; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457), (followed). Should the accused remain silent the evidence adduced is sufficient to warrant his conviction. The accused was thus ordered to enter his defence.

G CASE FOR DEFENCE

[61] The accused opted to testify on oath after the three modes of mounting his defence were explained to him. The flow of events testified by
H the accused is not inconsistent with the evidence led by the prosecution.

[62] The accused admitted that at the material time he was already divorced from the deceased. In June 2005 he met the deceased to *rujo'* but was refused by the deceased.

I

[63] At about 12.40am on 26 August 2005 he came back from dinner at Segamat town on a motorcycle. On his way he saw the deceased's car at Taman Bendahara. He turned his bike around and approached the deceased's car. He saw the deceased in the car with another man. As he neared the said

car, the car moved on. He followed the car to Segamat town. The deceased then drove back to Taman Bendahara and dropped the man near a factory where the man parked his car. He saw the man and could identify the man. The deceased next proceeded back to her house at Kampung Lubok Batu. He followed the deceased back to her house.

[64] At the verandah of the deceased's house, he asked the deceased about the man who was with her earlier. In his own words, he said 'isteri terus tengking saya. Isteri beritahu dia hendak keluar dengan siapa, nak kawan dengan siapa dan nak kahwin dengan siapa tidak ada kena mengena dengan saya'.

[65] He became very angry with the response given by the deceased and had a heated quarrel with her which lasted about ten minutes. Since the deceased had made her decision as such he next demanded custody of their youngest child and had wanted to take the child but was refused flatly by the deceased. The deceased then told him that she wanted to put up the night at her uncle's house across the road. The deceased then stood up and walked away. He followed the deceased.

[66] The accused continued by testifying:

> Saya ikut berjalan bersama bekas isteri dan beritahunya lagi saya ingin ambil anak saya. Saya nak jaga anak saya. Lepas itu bekas isteri memaki hamun saya dan cabar saya sambil berkata 'kalau berani bunuhlah saya'. Dia maki hamun saya dengan kata-kata 'pergi mampus, jantan sial, lelaki tidak berguna'.
>
> Pada ketika itu saya tidak sedar tangan saya telah cekik dia. Lepas saya cekik bekas isteri, dia terus jatuh. Saya cekik isteri dengan tangan. Semasa dia terjatuh kainnya tersingkap. Tidak pasti sama ada ketika itu dia masih hidup. Ketika itu nafsu saya naik. Saya mengoyak baju bekas isteri saya. Lepas itu saya buka coli dan seluar dalamnya, lepas itu saya buka seluar saya dan merogolnya.
>
> Lepas saya rogol bekas isteri, saya meletakkan telinga saya ke dada bekas isteri dan dengar masih ada degupan jantung lagi.
>
> Lepas itu saya tinggalkan bekas isteri dan ambil coli dan seluar dalamnya dan masukkan ke dalam bakul motorsikal saya. Lepas itu saya pergi rumah sewa bekas isteri dan ketuk pintu rumah tapi anak saya tidak buka pintu.
>
> Lepas itu saya naik motor saya dan pergi ke tepi sungai dalam keadaan takut. Malam itu saya tidur di tepi sungai.

[67] Asked by the court the accused said:

> Tidak tahu berapa lama pegang leher simati, pegang leher simati dengan satu tangan. Pegang dia ketika sedang marah sangat. Tidak tahu kekuatan yang saya gunakan kerana saya sedang marah. Saya naik marah di beranda rumah bila saya

A tanya simati siapa lelaki yang bersama dia dan dia cakap 'suka aku, aku nak kawan dengan siapa, nak kahwin dengan siapa pun, engkau apa susah ...'

Semasa itu dia cakap 'pergi mampuslah engkau, jantan tak guna, lelaki sial, saya naik marah dan terus pegang leher dia sampai simati jatuh pengsan. Saya naik marah sebab dia memaki saya ...'.

B

[68] These are the gists of the accused defence. In my view his defence could not hold water. He said that he held the neck of the deceased with one hand until the deceased fainted which he subsequently testified that it was for
C the purpose of keeping her mouth shut and to prevent her from further abusing him. It simply means he strangled the deceased using one of his bare hands. The accused must have employed considerable strength and force to the extent that it cause the deceased to faint. But the medical evidence suggested otherwise.

D

[69] In this regard PW8, the pathologist said, reproduced for purposes of accuracy:

Berdasarkan pada penemuan pada jasad si mati dan fakta mengenai kejadian ini
E saya memberi sebab kematian mangsa sebagai disebabkan oleh ligature strangulation atau pun dijerut dengan benda yang boleh dibuat tali

Asas dapatan: kerana terdapatnya tanda-tanda asphyxia iaitu congestion di muka, leher, upper chest, pendarahan tompok-tompok dikulit kepala,
F pendarahan kelupak mata dan kebiruan pada hujung jari dan dalaman terdapat buih-buih darah dalam saluran pernafasan serta tissue congestion pada bahagian leher. Juga jumpa scarf dililit dileher. Ini menunjukkan si mati kemungkinan besar mati dijerut. Seseorang yang mati' dijerut akan meninggalkan kesan-kesan seperti ini.

G Q: Kenapa?

Sebab leher mengandungi struktur yang penting seperti saluran darah yang membawa darah terus ke jantung atau keluar dari jantung. Terdapat saluran pernafasan, terdapat serat-serat saraf. Jika leher dicekik akan wujud kesan-kesan
H tadi. Kerana kain lembut digunakan tiada tanda pada leher. *Kalau cekik dengan tangan akan tinggalkan trauma/kecederaan pada tulang hyoid atau tyroid*. Tanda-tanda yang wujud mencadangkan si mati dicekik dengan scarf yang lembut.

I **[70]** Under cross-examination, PW8 answered:

Q: Kalau scarf tidak ada disitu adakah dapatan awak akan berbeza.

A: Kehadiran tanda-tanda asphyxia mencadangkan sesuatu yang seperti

itu berlaku iaitu jerut dengan kain. Kalau tidak ada scarf saya tidak akan kata kematian disebabkan oleh ligature strangulation. Tetapi akan kata kerana kehadiran tanda-tanda tersebut adalah disebabkan oleh asphyxia dan saya akan cari apakah yang menyebabkan axphyxia dalam kes ini.

[71] PW8's testimony was cogent enough. The asphyxia was due to ligature strangulation. He ruled out that strangulation was caused by bare hands on account that there was no trauma or injuries on the hyoid bones or thyroid of the deceased. Equally they were no injuries or trauma on the neck of the deceased because a soft material (scarf) was used to asphyxiate her. His testimony was not really challenged, it was not even suggested to him that the deceased was strangled to death by using bare hands. In such event PW8's testimony stood uncontroverted.

[72] The accused did nothing nor procure independent evidence to neutralised the evidence of PW8. Hence in the absence of any other evidence to the contrary, I rejected the evidence of the accused that he held the deceased's neck by using one of his hand until the deceased fainted and fell to the ground and thereafter proceeded to rape her. From the totality of the evidence adduced, the most logical inference that can be drawn is that the accused must have floored the deceased first, thereafter ravished her and finally strangled the deceased using the piece of scarf worn by her. His intention was clear. He wanted the deceased dead for the strangulation was long enough to have caused the death of the deceased. There can be no doubt that his intention was to murder the deceased.

[73] His excuse that he fled miles away from the scene after raping the deceased out of fear that the deceased might lodge a report against him for the rape is indeed a lame excuse. It is a lot more consistent with fleeing the scene out of guilt after committing a major crime ie intentionally causing the death of the deceased.

RELIANCE ON EXCEPTIONS

[74] The accused also relied on Exceptions 1 and 4 of s 300 of the Penal Code to account for his conduct. By s 105 of the Evidence Act 1950 the burden is upon him to prove the applicability of the said exceptions and the burden is discharged on a balance of probability — see *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153; [1973] 1 LNS 51.

Defence of grave and sudden provocation — Exception 1, s 300

[75] The Supreme Court in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ (Rep) 162 laid down that '... the test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self control (see *Nanavati v State of Maharastra* AIR 1962 SC 602)'.

[76] The Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 *at p 291E, F, G, H, I and at p 292 paras 14, 15, 16 and 17* gave a complete guide as to how this exception is to be applied. Nevertheless it reiterated that the question whether the provocation was grave and sudden such as to make the accused to lose self control is a question of fact and not one of law and that it is not enough to show that the accused was provoked into losing his self control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self control and induced him to do the act which caused the death of the deceased. The nature of the retaliation by the accused having regard to the nature of the provocation may also be considered together with other factors. Equally the provocation must not have been sought by the offender.

[77] Coming back to the case before me it is apparent that the deceased was very keen and very anxious to avoid the accused even from the very beginning at Taman Bendara. After the initial quarrel, she stood up, obviously to end the quarrel and left the compound of her own house to proceed to her uncle's house to put up the night there. The whole quarrel would then have ended there and the tragedy would not have taken place. However the accused was not satisfied and followed her and kept harassing her over the custody of their youngest child. It is thus very apparent that the accused was the one who was continuously committing the provocation. On the facts, there is no doubt that he sought the provocation from the very beginning when he first saw her in her parked car at Taman Bendahara with another man.

[78] The deceased retorted by snarling at him with the words 'pergi mampus, jantan sial, lelaki tidak berguna'. Next the accused found himself holding the deceased's neck. He claimed that he was not even aware when his hand got into snatching the deceased's neck or for how long he was holding the said neck. He gave the impression that he has totally lost his self control by the words uttered by the deceased. However, in my view this notion was negated by his own evidence that his purpose of holding the deceased's neck was singularly to keep her mouth shut and to stop further abuses from her.

[79] Very apparently in my view, this indicated that he was very much alive and was very much aware of what he was doing. He did not lose his self

control at all for he was able to reason out why he held the deceased's neck. He was still rational enough to account for his behaviour. Thus it follows that he should still be rational enough to choose his options to overcome further abuses from the deceased. A tight slap or two on her face would suffice to keep her mouth shut. The most practical and logical though is to leave her alone and go to court and fight for the custody of the said child rather than pursuing the issue in the middle of the night, which is the most unreasonable thing to do.

[80] Additionally the deceased had in fact moved on to go elsewhere to put an end to the issue and stop the quarrel. However the accused opted none of these but opted to silence the deceased for good, which in my view, on the facts and evidence, has no connection whatsoever with him losing his self control.

[81] Now, how grave and sudden was the provocation allegedly made by the deceased? In my view the words 'pergi mampus, jantan sial, lelaki tidak berguna' were rather ordinary words. There is nothing provocatively grave about the said words uttered by the deceased. We hear these words or its equivalent being spoken every other day, even on TV featuring drama Melayu. The words may have been offensive and stinging. But that is about all.

[82] In the context and circumstances under which those words were uttered by the deceased it could never have amounted to a grave provocation. Neither was it sudden. The deceased was equally a victim of the accused's abuses. The accused followed the deceased right from Segamat town and eventually accosted her at the front door of her house in the middle of the night. The accused started the quarrel. The deceased attempted to end the quarrel by proceeding to leave her house but again she was followed by the accused who continued with his harassments. The deceased snapped and bombarded him with those words. Apart from uttering those words the deceased did nothing else. The accused retaliated by ending her life.

[83] In my view in all the circumstances of the case the accused's reaction and retaliation is way out of proportion with the alleged provocation by the deceased which was neither grave nor sudden nor provocative. The accused may have been angered or offended but a reasonable man similarly circumstanced would not have been so provoked as to lose his self control and strangle the deceased in the manner he did. There was no provocation at all. A reasonable man sharing the same cultural, educational and religious background and upbringing with the accused would have exercised self restraint to contain the situation from going out of control. The conduct of the victim in *Che Omar bin Mohd Akhir v Public Prosecutor* is even worse. Yet

A the Federal Court thereat opined that the defence of grave and sudden provocation is not available to the defence in all the circumstances of the said case. In my view, on the facts and evidence the same defence is equally not applicable to the accused in the case presently before me.

B **[84]** In my view the accused had miserably failed to discharge the burden that Exception 1 of s 300 of the Penal Code operates in his favour.

Defence of sudden fight in the heat of passion upon a sudden quarrel — Exception 4, s 300

C

[85] In my view the defence mounted under this exception must also fail. Admittedly there was a quarrel but there was no fight between the deceased and the accused in the heat of passion upon the said quarrel. In the accused's own words '... Dia maki hamun saya dengan kata-kata pergi mampus, jantan D sial, lelaki tidak berguna. Pada ketika itu saya tidak sedar tangan saya telah cekik dia ...'. The evidence did not show that the deceased had engaged in a fight with the accused. In fact from the evidence of the accused, the deceased did not even have the chance to fight back as the accused had held his neck so strongly until she fainted and dropped to the ground. She was E overwhelmed by the sheer brute force of the accused. In the face of the evidence in its totality, I do not see how the accused could succeed in proving the sudden fight and other ingredients of Exception 4. Verily, learned counsel's submission on this defence is in essence without basis.

F

[86] The conduct of the accused lends credence to the learned TPR's submission that the accused was driven by other factors and motives that night in particular his desire to *rujo'*, his bitterness over the deceased's refusal to accommodate his request to *rujo'* and his rage and jealously upon seeing G the deceased earlier with another man whom he knew. The fact that he followed the deceased all over town and the fact that the first question he asked the deceased was about the man who was with her earlier in her car and his rage upon the answer given by the deceased merely fortified the learned TPR's submissions. I am most inclined to agree with him.

H

THE EVIDENCE DW2

[87] DW2 is the accused's brother. He came to court to say that the accused was behaving strangely of late (prior to incident). He was sick and I also appeared to be mentally disturbed. Days before murder of the deceased, he took the accused to his house, cared for him and took him to *Masjids* in Melaka for prayers and spiritual healings. But he never took the accused to hospital to find out what was really wrong with the accused.

[88] I find the evidence of DW2 to be wholly irrelevant. It does not add value to the defence as it was never the defence case that the accused was sick or was labouring under some kind of mental incapacity to account for his deeds.

FINDINGS AT THE END OF THE CASE OF THE DEFENCE

[89] Having considered the evidence in it entirety, I am wholly satisfied that the defence posited by the accused is insufficient to dislodge the prosecution's case. It has not created any reasonable doubt upon the prosecution's case (*Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; *Bala anak Matik v Public Prosecutor* [2006] 3 MLJ 516; [2006] 1 LNS 8). The prosecution, on the other hand, had proved its case against the accused beyond a reasonable doubt. There is no doubt whatsoever that the accused murdered the deceased Mimi Afiza bt Tamby in the early hours of 26 August 2005. The accused is thus found guilty and convicted of the offence as proffered. Accordingly he is sentenced to hang by rope by his neck until he is dead.

Accused convicted and sentenced to death.

Reported by Kanesh Sundrum